

**COMMONWEALTH OF KENTUCKY
KENTUCKY BOARD OF TAX APPEALS
FILE NO. K05-R-01**

CORNING INCORPORATED

APPELLANT

VS.

ORDER NO. K-19419

**COMMONWEALTH OF KENTUCKY
FINANCE & ADMINISTRATION CABINET
DEPARTMENT OF REVENUE**

APPELLEES

This matter is before the Board on the Petition of Appeal filed by Corning Incorporated (hereinafter Corning) from a final ruling of the Commonwealth Finance and Administration Cabinet, Department of Revenue dated December 3, 2004. This matter came before the Board for hearing on August 9, 2005. Both before and after the hearing the parties were given the opportunity to and have fully briefed the issues of the case.

The Board having reviewed the case including briefs, and being otherwise sufficiently advised, hereby states as follow:

FINDINGS OF FACT

Corning Incorporated is a New York corporation with its principal place of business at One Riverfront Plaza, Corning, New York and is qualified to do business in Kentucky.

The Kentucky Finance and Administration Cabinet through the Department of Revenue (hereinafter Department) issued Final Ruling No. 2004-36 dated December 3, 2004 wherein the Department denied refund claims for years 1986, 1987, 1988, 1989, 1990 and 1991. The

Department denied these claims on the basis that the claims were not timely made, that is, the claims were not made in writing within the applicable statute of limitations.

The parties agreed that no written refund claim was filed by Corning within two years from the time payment of the taxes in question was made. A timely petition of appeal was delivered to The Board.

CONCLUSIONS OF LAW

This Board is empowered to hear and decide appeals of final rulings of the Cabinet. KRS 131.340(1).

Corning Incorporated was a class participant in litigation filed in the Franklin Circuit Court under civil case number 00-CI-00623 styled ILLINOIS TOOL WORKS, INC. INDIVIDUALLY, AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED TAXPAYERS DENIED THE BENEFITS OF KRS 136.071 BECAUSE THEIR COMMERCIAL DOMICILES ARE OUTSIDE KENTUCKY V. REVENUE CABINET, COMMONWEALTH OF KENTUCKY, et al. (hereinafter “ITW”)

The thrust of Corning’s argument in this appeal is that by virtue of the order in that case KRS 136.071 was declared to be unconstitutional and void in its entirety. Corning also appeals the final ruling of the Cabinet which denied Corning’s refund claims relying upon the further holding in ITW that members of the class were entitled to “meaningful backward-looking relief for tax years ending on or before” the date of the ITW decision.

However, the Court in ITW also made it a condition precedent for any so called “meaningful backward-looking” relief that the “members of the class must satisfy all legal and procedural requirements applicable to refund claims, including the requirement that refund claims be timely filed under KRS 134.590.”

KRS 134.590 provides in pertinent part that “No refund shall be made unless an application for refund is made within two (2) years from the time payment was made”. KRS 134.590 (2). Admittedly Corning did not file a refund claim in writing within two years of the time payment was made for any of the years in question. Instead, Corning asserts that because the assessments were protested and further because the constitutionality issues ultimately resolved in Corning’s favor by the decision in ITW were being discussed with the Department as part of that protest process that Corning is entitled to rely upon equitable principles and should therefore be relieved of the statutory obligation to have filed a “written” application for refund. In Corning’s words, it asks the Board to require Revenue to “do the right thing” and return to Corning its overpayment.

The Court in ITW seems to have had just such a remedy in mind when it ordered “meaningful backward-looking” relief, particularly in its specific declaration that the members of the class are entitled to have “the assessments for those years set aside and voided”. However, insofar as applications for refunds are concerned, by requiring that ITW and members of the class “must satisfy all legal and procedural requirements...including the requirement that refund claims be timely filed under KRS 134.590” the Court gave the taxpayers the option of proceeding either upon a refund claim or to have the assessment “set aside and voided”. The option selected in this appeal by Corning was to prosecute this matter as a refund claim.

As such Corning was bound by statute and by the law of the ITW case to file such claims in writing within two years of the time payment was made. This Corning did not do.

The Board is not at liberty to ignore the clear intent of the legislature. The Board is not at liberty to ignore controlling judicial precedent. For these reasons the Board concludes that

Corning is not entitled to refunds for the years in question because its refund claims were not timely filed.

ORDER

The Board orders that the Cabinet's final ruling of December 3, 2004 is affirmed.

This is a final and appealable order. All final orders of this agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

(a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;

(b) A stay is permitted by the agency and granted upon request; or

(c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

Within twenty (20) days after service of the petition of appeal, or within further time allowed by the Circuit Court, the Kentucky Board of Tax Appeals shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review in compliance with KRS 13B.140(3).

DATE OF ORDER
AND MAILING: December 7, 2005

KENTUCKY BOARD OF TAX APPEALS
FULL BOARD CONCURRING

NANCY MITCHELL
CHAIR